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Case No: CO/1892/2023
AC-2023-LON-001606

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2024

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

The King on the application of

FG

Claimant

- and -

ROYAL BOROUGH OF KENSINGTON CHELSEA

Defendant

- -
- -

Zia Nabi and **Rea Murray** (instructed by **Hansen Palomares Solicitors**) for the **Claimant**
Ian Peacock (instructed by **Bi-Borough Legal Services**) for the **Defendant**

Hearing dates: 16-17 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Murray:

1. On 16 October 2023, Lang J ordered this "rolled-up" hearing of an application by the Claimant, to whom I shall refer as "FG", for permission to apply for judicial review of the alleged ongoing failure of the Royal Borough of Kensington and Chelsea ("RBKC") to act in compliance with its legal obligations under the Equality Act 2010 in relation to accommodation allocated to FG by RBKC, namely, a flat designated Flat 7 on the third (top) floor of a four storey block of flats owned by RBKC at an address in London W11 ("Flat 7").

2. Further to CPR r 39.2(4), having regard to FG's rights under Article 8 of the European Convention on Human Rights (ECHR), I consider it necessary to secure the proper administration of justice and in order to protect those rights that FG's identity not be disclosed in this judgment. This is because FG 's claim is based on her status as a disabled person, having been diagnosed in 2016 with paranoid schizophrenia, generalised anxiety disorder, and severe major depression with psychotic features. Her paranoid schizophrenia includes auditory and olfactory hallucinations. It is necessary to discuss her personal medical information in some detail in order properly to assess and, if permission is granted, to determine this claim. FG has a legitimate right to privacy in respect of her personal medical information. The needs of open justice are sufficiently served by the publication of this judgment without disclosing her identity.

3. FG has filed a related claim against RBKC, which was issued for service on 20 December 2023 (AC-2023-LON-003792) ("the Care Act assessment claim"). This was brought to my attention shortly before the hearing of this claim. The Care Act assessment claim supersedes part of this claim, as discussed further below. I was asked to consider FG's applications for expedition and permission in respect of the Care Act assessment claim at the conclusion of the hearing of this claim. I indicated to the parties that I would consider the expedition and permission applications in relation to the Care Act assessment claim once I had reached a decision on this claim. At the end of the hearing, I reserved judgment. I will not further address the Care Act assessment claim in this judgment, except as part of the background to this claim.

4. The claim is made on five grounds. I grant permission to apply for judicial review in respect of Grounds 1, 2 and 3 of the claim, as I consider those grounds to be arguable. The parties agree that Grounds 4 and 5 are superseded by the Care Act assessment claim. Accordingly, I refuse permission in relation to Grounds 4 and 5 as they are now academic as far as this claim is concerned.

5. Before setting out the three grounds for which I have granted permission (see [70] below), I provide a brief summary of the claim and its factual background, the procedural history to this point, the evidence relied on by each party, and the statutory framework.

Brief summary of the claim

6. As a result of her disability, FG has a heightened sensitivity or hypersensitivity to noise and to smell. That is not disputed. A complicating factor, however, is that, as I have already noted, the symptoms of FG's mental illness include auditory and olfactory hallucinations. The noise that FG complains of appears to come principally from Flat 5 in her building, which is situated immediately below Flat 7 on the second floor of the

same building ("the Noise Issue"). FG is not generally troubled by noises from the street outside the building. The smell that FG complains of is a foul smell in Flat 7, principally in the kitchen but sometimes also in other parts of Flat 7 ("the Smell Issue").

7. FG's claim, as it currently stands, is that, in essence, RBKC has discriminated against her, and continues to do so, in the exercise of a public function and/or has subjected her to a detriment in the provision of a service, in each case under relevant provisions of the Equality Act 2010, by refusing and/or failing to take reasonable steps to address the Noise Issue (Ground 1) and/or the Smell Issue (Ground 2). FG further alleges that, by failing to take reasonable steps to address the Noise Issue and/or the Smell Issue, RBKC has also failed to have due regard to the need to eliminate discrimination and/or advance equality of opportunity and is therefore in breach of the public sector equality duty ("PSED") set out in section 149 of the Equality Act 2010 (Ground 3).

8. In relation to the Noise Issue, FG says that she can hear everyday sounds from the flat directly below hers in the building, Flat 5. As a result, she struggles to sleep, and she has been spending time outside the flat to avoid the noise. When inside the flat, she has been self-harming. FG says that, as a result of the Smell Issue, she is unable to eat properly in Flat 7 or to use the washing facilities effectively, and this is another factor driving her to spend time outside the flat. FG maintains that her recovery is being significantly hampered by the Noise Issue and the Smell Issue. She relies on medical evidence to demonstrate the impact on her.

9. There has been extensive correspondence between FG's solicitors and RBKC regarding, inter alia, the noise and smell. There have been attempts by RBKC to remedy both the Noise Issue and the Smell Issue, but FG submits that those efforts have been insufficient and ineffective. A summary of the relevant correspondence is set out in FG's Statement of Facts and Grounds at paragraphs 13-33. FG's position is that the Noise Issue and the Smell Issue persist, and she is substantially disadvantaged by each of them. It is her case that each issue is having a significant impact on her physical and mental health.

Factual background

10. The parties have provided a useful and detailed agreed chronology. I do not need to set it out in full here. I have had regard to it.

11. FG was born in 1975. She has a significant history of trauma, having suffered abuse as a child and as an adult. She became homeless in 2015 following the loss of her job as a porter, which she had held for eight years. This followed sexual and other abuse by her manager, which led her to attempt suicide.

12. In 2015, FG was diagnosed with paranoid schizophrenia and with depression, for which she was and is prescribed substantial medication.

13. In November 2019, FG was referred to the South Kensington and Chelsea Community Mental Health Team, and she has been under their care since that time.

14. As a result of her paranoid schizophrenia, FG experiences auditory hallucinations. Her case is that she is particularly disadvantaged by her hypersensitivity to noise, as she confuses real noise with her auditory hallucinations, which causes her anxiety that the

hallucinations are worsening and/or becoming more frequent. She also experiences olfactory hallucinations, as well as hypersensitivity to smell.

15. In 2015, about the time that FG lost her job, she also became homeless. RBKC accepted that it owed her the main housing duty under Part VII of the Housing Act 1996, and it provided her with temporary accommodation.

16. FG was permitted to place bids for non-temporary accommodation on RBKC's Housing Register. She successfully bid on a flat at a building in Russell Gardens, London W14 ("the Russell Gardens flat") and was allocated permanent accommodation at the Russell Gardens flat under Part VI of the Housing Act 1996. She moved into that flat in September 2019.

17. Whilst in the Russell Gardens flat, FG experienced significant distress as a result of the impact of noise at the property, which RBKC was unable to remedy as it did not own the common parts.

18. Following correspondence and in light of FG's Care Plan Review, RBKC agreed to move FG to her current accommodation at Flat 7. This was a further allocation by RBKC under Part VI of the Housing Act 1996.

19. RBKC also agreed to carry out certain works at Flat 7 prior to FG's taking up residence, including works to address the recommendations of an occupational therapist, following an assessment carried out on 14-15 September 2021. Prior to moving in to Flat 7, FG had noticed that there was a smell in the flat. RBKC's principal surveyor, Mr James Davies, who had attended Flat 7, also found there to be a smell, as he noted in an email he sent to colleagues at RBKC on 24 March 2021.

20. FG claims that the delay in the necessary works at Flat 7 being completed caused her so much distress that her medication had to be increased as a result of the deterioration in her mental health. During this period, her solicitors issued two pre-action protocol letters to RBKC.

21. FG moved into Flat 7 on 25 May 2022, however she did not consider that the Noise Issue and the Smell Issue had been resolved prior to her moving in. FG's evidence is that the impact on her of both the noise and the smell were (and are) significant and were (and are) heightened as a result of her disability.

22. Following FG's move into Flat 7, her solicitors entered into correspondence with RBKC's solicitors during the subsequent weeks and months regarding the Noise Issue and the Smell Issue.

23. On 22 August 2022, Mr Tim McCormack, an Environmental Health Consultant, who had been jointly instructed on behalf of FG and RBKC, visited Flat 7 in order to survey and assess disrepair and statutory nuisance issues potentially affecting the property.

24. On 31 August 2022, Mr McCormack produced his report. He noted that there was a smell in the kitchen, but he considered that it was not a foul smell related to foul or waste water but rather "a strong smell that I would associate with new white electrical goods". He did not, therefore, rate it as a statutory nuisance.

25. FG's solicitors instructed an acoustics expert, Mr Kyriakos Papanagiotou, Managing Director of a company called KP Acoustics Ltd, to act as an expert witness for FG in relation to the Noise Issue, with particular regard to noise from Flat 5. Mr Papanagiotou was instructed to undertake a sound insulation investigation of the party floors and other sound insulation issues and to identify remedial options. Mr Papanagiotou inspected Flat 7. On 1 November 2022, he produced his report ("the KP Acoustics Report"). He concluded that airborne noise levels in Flat 7 emanating from Flat 5 marginally failed to comply with the relevant standard under the Building Regulations 2010, but that the failure (by 1dB) was within the normal tolerance of sound testing. In other words, had the test been repeated, the result might have demonstrated compliance. He also noted that compliance with the Building Regulations was a minimum standard and did not mean that noise from a neighbouring property would be inaudible.

26. Mr Papanagiotou also made the following observation at paragraph 4.5 of the KP Acoustics Report:

> "Additional background noise measurements were undertaken in the Bedroom of Flat 7 in order to understand typical noise levels experienced by [FG]. With the tenant of Flat 5 and the two children freely moving in the flat, background noise was measured at L_{Aeq} 32dB, which is within acceptable noise levels as per BS8233:2014 recommended internal daytime and night-time noise level criterion of 30-35db L_{Aeq}."

27. Mr Papanagiotou, who carried out his investigation during the day, noted that domestic noise was reasonably masked by typical daytime ambient noise from the surrounding environment, for example, road traffic, but would be more noticeable at night when ambient noise is low.

28. In section 5 of the KP Acoustics Report under the heading "Upgrade Strategy", Mr Papanagiotou set out a number of recommendations for structural changes that could be made in order to minimise noise transfer between Flats 5 and 7, particularly addressing weak points for noise transmission between them. Full implementation of these recommendations would require structural work within Flat 5 and would to some extent reduce its living space.

29. During the course of February and March 2023, upon instructions from RBKC, engineers from First Choice Drainage Solutions Limited ("FCDS") attended Flat 7 on five occasions to investigate and attempt to deal with the Smell Issue. The visits were as follows:

    i) 2 February 2023 – An engineer attended for one hour in order to investigate the bad smell reported by FG. The engineer recommended returning to investigate the roof space to check if a vent was blocked.

    ii) 17 February 2023 – An engineer attended for two hours, gained access to "the hatch", and noted that this was not "access to roof … just a loft conversion with nothing in it". He also noted "slight smells" and recommended "a small bore pipework clean".

iii) 1 March 2023 – An engineer attended for three hours to clear and clean all small-bore pipework. He noted, however, that the smell "doesn't seem to be coming from pipe" but rather "from the void so may be there is a break in the vent pipework". He advised that an engineer should return to site with a ladder, get access to the loft, and check all pipework and "camera down the stack if we are able to access it". He recommended that if the problem was not found in that way, then the boxed-in void in the kitchen should be checked for breaks.

iv) 23 March 2023 – An engineer attended for two hours and carried out some investigations using a drain camera. He advised returning with at least two engineers, cleaning the stack completely, and carrying out related work.

v) 30 March 2023 – Two engineers attended for four hours and carried out a descale of the stack pipe throughout the building. No issues (cracks or breaks) were found with the stack pipe upon inspection with a drain camera, which was flowing correctly. On this last occasion, the engineers informed FG that if the smell was still there by 3 April 2023, they would return to remove the boxing behind the dishwasher and investigate further.

30. On 22 February 2023, having been instructed by RBKC, Mr Stephen Cockram, a chartered surveyor from the firm PG Ashton & Sons, carried out an inspection of Flat 7 for the purpose of assessing problems of disrepair and preparing an expert's report. Among the documents he considered prior to the inspection was Mr McCormack's report dated 31 August 2022 and the survey report produced by FCDS following their visit on 17 February 2023. Among his conclusions in part 7 of this report, Mr Cockram noted the following regarding the Smell Issue at paragraph 7.01:

> "… Although not strictly speaking disrepair the main concern of the tenant [FG] relates to a smell nuisance problem within the kitchen and to a lesser extent the bathroom. Generally these were not noted at the time of my visit although when the dishwasher to the kitchen was pulled forward I did detect some unusual smell to the exposed area beneath the kitchen worktop (adjacent to the service duct). However, this had disappeared when I returned to the area around twenty minutes later. This could simply be due to the fact that there was a dishwasher in position. Nevertheless, there is a gap beneath the panel of the service duct where a draught could be felt. If there is a defect to the drainage stack, for example a crack then foul air could be entering the service duct itself and in turn enter in the kitchen via the gap at the foot of the service duct. The Landlord's contractor First Choice Drainage Solutions has suggested descaling all small bore pipework to prevent smells, and in the first instance this should be carried out. If this is not successful then I would suggest a gap at the foot of the service duct panel is sealed. If the tenant is concerned that the smell continues then service duct panels should be removed to examine the drainage stack."

31. As I have already noted, the descaling of the small-bore pipework was subsequently carried out by FCDS, but they concluded, following the descaling, that the smell was

not coming from the small-bore pipework. They also subsequently concluded that there was no crack or other defect in the drainage stack.

32. Although Mr Cockram did not deal with the Noise Issue in his conclusions, he briefly discussed FG's concern about noise nuisance during the course of the report. He observed some noise coming from outside the flat, which he discovered to be a caretaker cleaning the staircase. He considered this type of noise not to be unusual.

33. On 8 June 2023, Environmental Health Officers from RBKC, Mr Keith Mehaffy and Mr Winston Labarr, carried out an assessment of noise between Flat 7 and Flat 5. The report's conclusion was as follows:

> "…
>
> The property was built [in the 1960s] prior to Approved Document E of the Building Regulations coming into being and as the Building Regulations standards not being retrospective, there is no requirement for the separating partitions between flats 5 and 7, to comply.
>
> The airborne sound insulation test carried out by KP Acoustics confirmed that the airborne standard was only 1dB below the criteria in Approved Document E. The report advises 'It must be noted that the 1dB is within the normal tolerance of sound testing, so a repeat test could possibly demonstrate compliance with the minimum Building Regulations requirements.'
>
> It would be unreasonable for a person living in a multi-occupied property such as Galsworthy House, to expect not to hear noise from their neighbours and in my view the transference of sound between flats 5 and 7 is what I would expect for this style of dwelling. It is my view that following a comprehensive and wide-ranging investigation of the sound transmission between properties that further acoustical measures are not necessary to be undertaken as the Band J rating, demonstrates that the property is no worse than the average property, and is identical to the national average for this style of property. We will also advise the Housing Department that the self-closing device on the entrance door to flat 5 needs to be adjusted to slow close and prevent it slamming shut creating noise in the reverberant common hallway."

34. On 13 June 2023, RBKC's senior surveyor, Mr Nick Collins attended Flat 7 together with contractors (his witness statement says that this visit took place on 16 June 2023, but it is agreed that this is a typographical error). He conducted investigations of the sections of the stack pipe in Flats 1, 5 and 7. His findings, set out in his witness statement of 21 June 2023, were in summary that:

i) In Flat 1, a smell was noted initially. When the boxing around the stack pipe was removed, a dead rat was found. It was removed, and the area was

disinfected. The stack pipe was investigated and found to be fully sealed with no leaks or damage. The boxing was replaced and resealed.

ii) In Flat 5, the boxing around the stack pipe was removed. The stack pipe was checked. There was no evidence of any cracks, leaks or other relevant disrepair. The boxing was replaced.

iii) In Flat 7, when the panels around the stack pipe were removed, Mr Collins and the contractors with him were unable to detect any smell, although FG expressed discomfort because she was experiencing a smell. A slight gap in the boxing at Flat 7 that had been noticed by Mr Cockram and by FG was sealed.

35. On 23 November 2023, FG's solicitors asked KP Acoustics Ltd whether they could prepare a schedule of works to be carried out within Flat 7 to address the Noise Issue and also for an estimate of the likely cost of carrying out that work.

36. On 20 December 2023, KP Acoustics Ltd provided a response in which they described works that could be undertaken entirely within Flat 7 in order to address the Noise Issue. They noted, however, that such works would "heavily" reduce the habitable dimensions of FG's flat. They advised that their proposals in their report dated 1 November 2022, which principally involved works within Flat 5, were preferable as they would be more targeted (aiming to control noise "at source"), would not have a significant material impact on the habitable dimensions of Flat 5, and would most likely be a fraction of the costs of undertaking works entirely within Flat 7. KP Acoustics Ltd indicated that they were not able to provide any specific anticipated costs, as the figures would vary greatly, depending on the appointed contractor's fees, labour, and material costs.

Procedural history

37. On 9 December 2022, FG's solicitors sent a pre-action protocol letter to RBKC, to which RBKC responded on 16 December 2022.

38. On 5 February 2023, FG's solicitors sent a further pre-action protocol letter to RBKC.

39. On 24 May 2023, FG's claim was received by the court and issued for service.

40. On 26 May 2023, RBKC served its Care Assessment.

41. On 12 June 2023, FG filed an Application Notice seeking expedition, permission to amend her Statement of Facts and Grounds, and to extend time for the filing of the Defendant's Acknowledgment of Service.

42. On the same day, Mr Richard Clayton KC, sitting as a deputy High Court Judge, made an order directing RBKC to serve its Acknowledgement of Service no later than 21 days after the service of his order. Unless Mr Clayton made another order on the same day dealing with the same application, which seems unlikely (I have not been provided with one), that is as far as his written order goes. However, at paragraph 10 of his reasons for making his order, Mr Clayton says:

> "… I have granted the Claimant's application to amend her Statement of Facts and Grounds so as to set out any grounds to

> challenge [the Care Assessment served by RBKC on 26 May 2023]."

43. Accordingly, it appears that permission to amend was implicitly granted by Mr Clayton. FG subsequently filed her Amended Statement of Facts and Grounds.

44. On 7 July 2023, FG filed an Application Notice seeking permission to make further amendments to her Amended Statement of Facts and Grounds, to file further evidence, and to rely on her Reply to the Summary Grounds of Resistance. She also sought directions for the filing and service by RBKC of Amended Summary Grounds of Resistance within 21 days of the order made on this application.

45. On 19 July 2023, RBKC filed its response to FG's application of 7 July 2023.

46. On 8 September 2023, May J granted FG permission to make further amendments to her Amended Statement of Facts and Grounds, restricted to those indicated in the application, and to rely on the further evidence set out in the application and directed RBKC to serve Amended Summary Grounds of Resistance within 14 days of service of the order and that the papers be referred to a single judge for consideration of permission. FG subsequently filed her Re-Amended Statement of Facts and Grounds.

47. On 22 September 2023, RBKC filed Amended Summary Grounds of Resistance in accordance with May J's order dated 8 September 2023.

48. On 16 October 2023, Lang J ordered that this matter be listed for a "rolled-up" hearing, granted FG's application for permission to file a Reply, and made case management directions.

49. On 16 October 2023, the rolled-up hearing was fixed for 16 January 2024.

50. On 7 November 2023, RBKC filed Detailed Grounds for Resisting the Claim and an accompanying bundle of documents in accordance with the case management directions of Lang J.

51. On 23 November 2023, FG filed evidence in reply in accordance with the order of Lang J, namely, her third witness statement (dated 20 November 2023) and the second witness statement (dated 21 November 2023) of her solicitor, Mr Jacobo Borrero.

52. On 8 January 2024, FG's solicitors filed an Application Notice seeking an order permitting FG to rely upon a skeleton argument exceeding 25 pages and to file and rely upon further evidence. This application was not opposed by RBKC, and I granted it at the start of the hearing before me.

Documents

53. For the hearing, I had a core bundle of documents and a supplementary bundle. FG's evidence includes witness statements dated 8 December 2022, 18 May 2023, and 1 June 2023 made by FG and witness statements dated 7 July 2023 and 21 November 2023 made by Mr Jacobo Borrero, a solicitor at Hansen Palomares, as well as a psychiatric report dated 26 June 2023 prepared by Dr Pranveer Singh, a consultant psychiatrist, and an addendum to that report dated 14 December 2023 prepared by Dr Singh. RBKC's

evidence includes a witness statement dated 21 June 2023 made by Mr Nick Collins, Senior Surveyor, employed by RBKC.

54. In addition to the pleadings, orders made in these proceedings, and correspondence, the core and supplementary bundles include various other documents including expert reports and other technical evidence relating to the Noise and Smell Issues and medical and related evidence relating to FG, including an Occupational Therapy assessment dated 15 September 2021. I refer to a number of these documents in the judgment, but even where not referred to in the judgment, I have had regard to every document referred to in the written and oral submissions of the parties, including all of the suggested pre-reading.

Statutory framework

55. The relevant legal principles underpinning the claim are discussed in the submissions of the parties and in my analysis and decision below. As is clear from the grounds, the key statutory provisions under which the claim is brought are all found in the Equality Act 2010. FG relies, in particular, on sections 20, 21, 29, and 149.

56. Sections 20 and 21 fall within Part 2 (Equality: Key Concepts). Section 29 falls within Part 3 (Services and Public Functions). Section 149 falls within Part 11 (Advancement of Equality).

57. Section 20 applies where, under other provisions of the Act, a duty to make reasonable adjustments for disabled persons is imposed on a person. Section 20 makes clear that the duty is comprised of three requirements. The relevant one for present purposes is the second requirement, which is set out at section 20(4) ("the Second Requirement") and reads as follows:

> "The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

58. The first requirement, which is set out at section 20(3) ("the First Requirement"), is mentioned in some of the cases cited by counsel, and so for convenience I set it out here:

> "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

59. Section 20(9) clarifies that, in relation to the Second Requirement, "avoiding a substantial disadvantage" includes removing the physical feature in question, altering it, or providing a reasonable means of avoiding it. Section 20(10) clarifies that a "physical feature" is:

> "(a) a feature arising from the design or construction of a building,
>
> (b) a feature of an approach to, exit from or access to a building,
>
> (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
>
> (d) any other physical element or quality."

60. It is not disputed in this case that noise and smell fall within clause (d) of the definition of "physical feature". I note, however, that they are only relevant as physical features to the extent that they are perceived by FG in Flat 7. FG's claim does not extend to her experience of noise or smell to which she is hypersensitive in the common parts of her building. This is relevant when I come, in due course, to consider the list of issues agreed by the parties.

61. Section 21 provides that a failure to comply with any of the three requirements in section 20 (at (3), (4), and (5)) is a failure to comply with a duty to make reasonable adjustments for a disabled person and is therefore discrimination against that person.

62. As I have already noted, a key issue between the parties is whether this claim falls within Part 3 (Services and Public Functions) or Part 4 (Premises) of the Equality Act 2020. If it falls within Part 3, as contended for by FG, then the Second Requirement applies. If it falls within Part 4 then the Second Requirement does not apply. Section 28(2)(a) makes it clear that if Part 4 applies to alleged discrimination, harassment or victimisation, then Part 3 does not apply.

63. Section 29, which is the principal substantive provision of Part 3 of the Equality Act 2010, prohibits a service-provider (namely, a person concerned with the provision of a service to the public or a section of the public, whether or not for payment) from discriminating against a person requiring the service by refusing to provide it to that person. Section 29(2) prohibits the service-provider ("A") from discriminating against a person ("B"):

> "(a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) *by subjecting B to any other detriment*." (emphasis added)

64. FG relies on section 29(2)(c). Section 29 also prohibits harassment and victimisation. Section 29(6) extends the scope of the prohibition on discrimination, harassment, or victimisation to a person exercising a public function that is not the provision of a service to the public or a section of the public. Section 29(7) makes clear that the duty to make reasonable adjustments applies to a service-provider and to a person who exercises a public function. Section 31 (Interpretation and exceptions) makes clear that a reference in Part 3 to the provision of a service includes the provision of a service in

the exercise of a public function and that "public function" means "a function of a public nature for the purposes of the Human Rights Act 1998".

65. In January 2011, the Equality and Human Rights Commission (EHRC) published a Statutory Code of Practice on "Services, public functions and associations" ("the Code of Practice"). It was published pursuant to the EHRC's power to do so under section 14 of the Equality Act 2006. It is a statutory code, approved by the Secretary of State and laid before Parliament. It is not a definitive statement of the law, but, given its status, I am required to (and do) take into account any part of the Code of Practice that appears to me to be relevant to the questions arising in these proceedings.

66. Part 4 of the Equality Act 2010 sets out provisions prohibiting discrimination, harassment, and victimisation in the disposal (for example, by letting) and management of premises. Section 32 sets out various exclusions from Part 4, the relevant one for present purposes, set out at section 32(3)(b), reading as follows:

> "(3) This Part does not apply to the provision of accommodation if the provision—
>
> …
>
> (b) is for the purpose *only* of exercising a public function or providing a service to the public or a section of the public." (emphasis added)

67. Section 20(13) provides that Schedule 2 to the Equality Act 2010 applies to matters falling within Part 3 and Schedule 4 applies to matters falling within Part 4. Paragraph 2(1) of the Schedule 2 makes clear that the Second Requirement applies to a matter falling within Part 3 of the Act. Paragraph 2(2) of Schedule 4 makes clear that the Second Requirement does *not* apply to a matter falling within Part 4 of the Act. Each Schedule provides further detail on the scope and effect of the Part to which it relates.

68. Section 136 of the Equality Act 2010 deals with the burden of proof. In relation to a contravention of the Act that does not constitute an offence, there is an evidential burden on a person bringing a claim to adduce sufficient facts to establish, in the absence of any explanation from the defendant, that the defendant has contravened the Act. The defendant then bears the burden of proving that it did not do so.

69. Section 149 of the Equality Act 2010 sets out the PSED. The parts of section 149 of relevance for present purposes are:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having *due regard* to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

…

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

…

(6) *Compliance with the duties in this section may involve treating some persons more favourably than others*; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

… ;

disability;

… .

(8) A reference to conduct that is prohibited by or under this Act includes a reference to

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

… .” (emphasis added)

Grounds for which permission is given

70. I have given permission for FG to apply for judicial review in relation to Grounds 1, 2 and 3 of her Re-Amended Statement of Facts and Grounds. These are:

i) Ground 1: RBKC has, in refusing and/or failing to take reasonable steps as set out in the KP Acoustics Report (under “upgrade strategy”) and/or such other steps as it is reasonable for it to have to take, including instructing an acoustic engineer to inspect and report on works to carry out and [then to] carry out those works, to address/avoid the noise at the accommodation and/or decant FG to avoid it, failed to act in accordance with its legal obligations in that it has:

a) discriminated against FG, and continues to do so, within the meaning of sections 20 and 21 of the Equality Act 2010 in the exercise of a function; and/or

b) subjected FG to a detriment in the provision of a service contrary to section 29(6) and/or section 29(2)(c) of the Equality Act 2010.

ii) Ground 2: RBKC has in refusing and/or failing to take steps as recommended in the report of PG Ashton & Sons (removing the panelling) [that] it is reasonable for it to have to take to address/ avoid the smell at the accommodation and/or to decant FG to avoid it, including but not limited to, opening up and thoroughly cleaning the ducting area at [Flat 1], take advice from RBKC’s Environmental Health Officer as to how to successfully clear the area of smells, proofing the area to prevent access by animals, and properly sealing all ducting panels, failed to act in accordance with its legal obligations in that it has:

a) discriminated against the Claimant, and continues to do so, within the meaning of sections 20 and 21 of the Equality Act 2010 in the exercise of a function; and/or

b) subjected her to a detriment in the provision of a service contrary to section 29(6) and/or section 29(2)(c) of the Equality Act 2010.

iii) Ground 3: RBKC has failed to have due regard to the need to eliminate discrimination and/or advance equality of opportunity in its dealing with FG’s accommodation and, in particular, its failure to take reasonable steps in respect of the noise and/or smell and/or to decant FG to alternative accommodation.

List of issues

71. The parties have agreed that these three Grounds raise the following issues:

i) Does this claim fall under Part 3 (Services and Public Functions) or under Part 4 (Premises) of the Equality Act 2010?

ii) If it falls under Part 3, can a physical feature of Flat 7 or Flat 5 give rise to the Second Requirement being imposed on RBKC even though RBKC is not in occupation of Flat 7 or Flat 5?

iii) If so, does a physical feature of Flat 7, Flat 5, or the common parts put disabled persons generally at a substantial disadvantage in relation to the provision of a service, or the exercise of a public function, by RBKC in comparison with persons who are not disabled?

iv) If so, what steps is it reasonable for RBKC to take to avoid that disadvantage?

v) In relation to FG's complaint about excessive noise in her flat, has RBKC discriminated against FG by failing to:

a) adopt the upgrade strategy proposed in the KP Acoustics Report; or

b) take other steps such as instructing an acoustics engineer to inspect and report on works and then carrying out those works; or

c) decant FG to another property?

vi) In relation to FG's complaint about a foul smell in her flat, has RBKC discriminated against FG by failing to:

a) carry out a further inspection and seal the drainage stack and waste pipework; or

b) decant FG to another property?

vii) Has RBKC breached its obligations to FG under the PSED?

viii) Is the claim, or any part of it, out of time?

Submissions

72. Mr Zia Nabi, counsel for FG, submitted that FG has a severe and disabling chronic mental health condition, aspects of which include self-harm and suicidal ideation. She has attempted suicide. It is not disputed that she has the protected characteristic of disability. The Noise Issue and the Smell Issue exacerbate her mental health condition, and each has caused her to spend time outside Flat 7 because of her distress. She is unable to use her kitchen to cook food or wash herself in her bathroom because of the foul smell. FG's evidence and that of her mental health team support the conclusion that she has suffered severe stress and anxiety because of the Noise Issue and the Smell Issue and that her basic functioning is affected.

73. Mr Nabi submitted that the evidence of Dr Singh confirms that persons suffering from schizophrenia can be oversensitive to loud noise and strong smells and that these factors can increase such a person's risk of self-harm and suicide. Regarding the Noise Issue, Mr Nabi accepts that the evidence (including the KP Acoustics Report and the report of RBKC's Environmental Health Officers) shows that the noise level is at or about an "average" level, but, he submits, this is not an answer to this claim in circumstances where FG has a protected characteristic, namely, disability in the form of paranoid

schizophrenia, which includes hypersensitivity to noise, and that characteristic is shared with other sufferers from the same disability, as confirmed by Dr Singh's evidence. Regarding the Smell Issue, he submitted, there is undisputed evidence that there is a foul smell present at Flat 7.

74. Mr Nabi submitted that it is uncontroversial that the ongoing provision of accommodation by RBKC to FG is the provision of a service in the exercise of a public function falling within Part 3 of the Equality Act 2010. He notes that RBKC appears to accept this, but then argues that it is brought under Part 4 of the Equality Act 2010 because the ongoing provision is not solely for the purpose of a public function but also for the purpose of complying with RBKC's obligations under the tenancy agreement for Flat 7. Mr Nabi submitted that this latter argument is wrong.

75. Mr Nabi submitted that RBKC's ongoing provision of accommodation to FG falls under Part 3 of the Equality Act 2010 for the following reasons:

    i) RBKC is a core public authority exercising the public function of providing social housing, namely, subsidised housing to vulnerable members of society, in accordance with its statutory obligations, including its obligations under the Housing Act 1996;

    ii) the effect of section 32(3) of the Equality Act 2010 is to exclude the application of Part 4 of the Equality Act 2010 from the function of providing accommodation where the provision is "… for the purpose *only* of exercising a public function or providing a service to the public or a section of the public" (emphasis added); and

    iii) a local authority providing public housing at low rent to vulnerable groups in society is acting solely in the exercise of its public function: ***R (Nur) v Birmingham County Council*** [2021] EWHC 1138 (Admin), [2021] HLR 41 at [147]-[149].

76. Mr Nabi submitted that RBKC's argument that its provision of accommodation to FG is not solely for the purpose of exercising its public function of allocating social housing but is also for the purpose of complying with its obligations under the tenancy agreement is clearly wrong. The tenancy agreement regulates the relationship between the parties and is subject to statutory control. Compliance with the tenancy agreement is manifestly not the *purpose* of entering into the tenancy agreement. It simply forms part of its exercise of the public function.

77. Mr Nabi submitted that the consequence of this case falling under Part 3 of the Equality Act 2010 is that the Second Requirement applies and therefore that, in relation to a physical feature that puts FG at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, RBKC is required to take such steps as it is reasonable to have to take to avoid the disadvantage. In this case, there are two relevant physical features, namely, the noise level in Flat 7 and the presence of a foul smell there, that put FG at a substantial disadvantage relative to non-disabled persons (namely, those who do not share her disability-related hypersensitivity to noise and smell). RBKC is obliged to take reasonable steps to avoid the disadvantage, such as those set out in Ground 1 in relation to the Noise Issue and in Ground 2 in relation to the Smell Issue.

78. Mr Nabi submitted that RBKC has discriminated against FG by failing to make reasonable adjustments to address the Noise Issue or the Smell Issue, despite the evidence adduced by FG, which is not effectively controverted by RBKC, of the impact of each of these on her mental health. RBKC has not provided evidence to show that it has considered adequately or at all whether FG should be treated more favourably than a non-disabled person because of the substantial disadvantage to her of living in Flat 7 given the Noise Issue and the Smell Issue.

79. Mr Nabi submitted that the fact that RBKC is not in occupation of Flat 7 (in order to address the Smell Issue) or Flat 5 (in order to address the Noise Issue) makes no difference to RBKC's obligation to comply with the Second Requirement. It is merely relevant to the practicalities of doing so and what is reasonable.

80. In relation to Ground 3, Mr Nabi submitted that there is no evidence that RBKC has acted in this case with the PSED in mind. In fact, the evidence shows the contrary, namely, that RBKC has failed to have due regard to the fact that compliance with the PSED may involve treating disabled persons more favourably than non-disabled persons. An example of this is its position in relation to the Noise Issue, where it relies on evidence from KP Acoustics and its EHO that the noise level in Flat 7 is no worse than the average property.

81. Finally, in relation to delay, Mr Nabi submitted that this claim is not out of time. The duty to make reasonable adjustments is a continuing duty. Drainage works were carried out on 30 March 2023 but failed to resolve the Smell Issue. The claim was issued on 24 May 2023. RBKC's EHO carried out a noise assessment on 8 June 2023. Alternatively, given the developing circumstances, the court is asked to extend time.

82. In relation to Ground 1, Mr Ian Peacock, counsel for the RBKC, submitted that, although RBKC accepts that FG is a disabled person, her claim is misconceived in a number of respects. The first point is that this case falls under Part 4 of the Equality Act 2010, and therefore the Second Requirement does not apply. This is for the following reasons:

    i) On the face of it, Part 4 of the Equality Act 2010 applies. RBKC is a person who manages premises and is a controller of let premises, namely, in this case, Flat 7.

    ii) FG relies on section 32(3)(b) of the Equality Act 2010 to exclude the letting of Flat 7 from Part 4 of the Equality Act 2010, but this is wrong. The provision of Flat 7 to FG is the relevant public function, and therefore it is not provided "for the purpose" of exercising a public function, much less "only" for that purpose. But even if the provision is "for the purpose" of exercising a public function, it is not the "only" purpose. Flat 7 is also provided for the purpose of complying with RBKC's private law contractual obligations under the tenancy agreement.

83. Mr Peacock submitted that, even if RBKC is wrong, and the claim falls under Part 3 of the Equality Act 2010 so that the Second Requirement is potentially applicable, the Second Requirement does not apply in this case for the following reasons:

    i) Paragraph 2(2) of Schedule 2 to the Equality Act 2010 makes clear that the Second Requirement is only engaged if a physical feature puts *disabled persons generally* at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled. The Court of Appeal in *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, [2014] 1 WLR 445 (CA) made clear, in relation to the First Requirement, that the duty to make reasonable adjustments is anticipatory and is determined by reference to the needs of disabled persons as a class and not by reference to an individual in a specific case. By analogy, this also applies to the Second Requirement. FG was therefore wrong to suggest at paragraph 69 of her skeleton argument that the duty includes "the continuing and evolving duty to make adjustments in individual cases".

ii) FG needs to show that the situation at Flat 7 puts a class of disabled persons at a substantial disadvantage rather than simply that it puts her at a substantial disadvantage. FG also needs to identify the nature and extent of any such disadvantage before the reasonableness of any claimed adjustments can be considered: *R (Imam) v London Borough of Croydon* [2021] EWHC 739 (Admin) at [87], [89]. FG has provided no evidence sufficient to discharge the burden on her in relation to these points. There is no evidence that a significant proportion of disabled persons share FG's particular sensitivities to noise and smell.

iii) As a matter of statutory interpretation (despite the use of the word "includes"), paragraph 2(6) of Schedule 2 limits the scope of "physical features", in relation to premises not occupied by the person subject to the Second Requirement ("A"), to those brought by or on behalf of A on to the premises. RBKC does not occupy Flat 7. FG has not identified any relevant physical features brought by or on behalf of RBKC on to the premises of Flat 7.

84. Mr Peacock further submitted that even if the Second Requirement applied, it would not be reasonable for RBKC to take the steps set out in the KP Acoustics Report or to appoint a further expert and follow any recommendations made by that expert.

85. Finally in relation to Ground 1, Mr Peacock submitted that RBKC's decanting FG to alternative accommodation cannot possibly constitute a reasonable step to avoid the disadvantage created by a physical feature to a *class* of disabled persons. In any event, any move to alternative secure accommodation would constitute an allocation of accommodation under Part VI of the Housing Act 1996, which could only take place in accordance with RBKC's allocation scheme (section 166A(14) of the Housing Act 1996). Paragraph 2(8) of Schedule 2 to the Equality Act 2010 makes clear the Second Requirement cannot compel RBKC to take a step it has no power to take. If FG wishes to move from Flat 7, it is open to her to apply under Part VI of the Housing Act 1996 and her application will be considered under the scheme.

86. In relation to Ground 2 and the Smell Issue, Mr Peacock submitted that, as far as the general principles were concerned, the claim fails for the same reasons as it fails in relation to Ground 1 and the Noise Issue. RBKC has taken the steps recommended in the report of PG Ashton. As far as RBKC is concerned, there is no significant or unusual smell at Flat 7.

87. In relation to Ground 3, Mr Peacock submitted that the PSED requires RBKC to have due regard to the need to take steps to take account of FG's health problems, but it does not impose a requirement to make findings about the precise effect of the duty, follow

a structured approach, or give reasons. What matters is substance, not form: *McMahon v Watford Borough Council* [2020] EWCA Civ 497, [2020] HLR 29 at [52], [62], [68]. Mr Peacock submitted that RBKC had complied with the duty. It has focused on FG's needs arising from her health problems, going, on account of her particular vulnerabilities, well beyond what it would normally have done for a tenant in seeking to tackle the Noise and Smell Issues. *McMahon* at [48] makes clear that the PSED is not a duty to achieve a particular result, but rather to have due regard to the need to meet the aims set out in section 149, which it has done.

88. In relation to delay, Mr Peacock submitted that under CPR r 54.5(1), the claim should have been brought promptly and, in any event, within three months of the grounds for the claim arising. The fact that the duty is a continuing one does not help FG, as CPR r 54.5(1) requires the claim to be brought within three months of its first having arisen. FG's solicitors wrote to RBKC on 9 December 2022 arguing that RBKC was subject to a duty to make adjustments to address the Noise Issue and the Smell Issue. The claim was not, however, issued until over five months later, on 24 May 2023.

Discussion

89. The first issue that I need to determine, namely, whether this claim falls under Part 3 or Part 4 of the Equality Act 2010, is not straightforward. It turns on the proper interpretation of section 32(3)(b) of the Equality Act 2010, on which there is relatively little authority.

90. One case that addresses this question is *Nur*, in which David Lock QC, sitting as a deputy judge of the High Court, after noting that he had "wavered on the point both during the hearing and in my post-hearing deliberations", decided at [147]-[150] that the defendant local housing authority in that case was providing accommodation solely to fulfil its statutory obligations under section 166A of the Housing Act 1996, and therefore it was doing so solely for the purpose of either (i) providing a service to the public under section 29(1) of the Equality Act 2010 or (ii) discharging a public function under section 29(6). He considered that it did not matter in that case which of these two characterisations was correct, although the "better analysis" was the latter. In either case, section 32(3) was engaged, and therefore the claim in that case fell under Part 3 of the Equality Act 2010 rather than under Part 4.

91. *Nur* concerned a "provision, criterion or practice" ("PCP") of the defendant's housing allocation scheme under Part VI of the Housing Act 1996, engaging the First Requirement. An important issue in that case was whether the claim fell under Part 3 or under Part 4 of the Equality Act 2010. If the claim fell under Part 3, then, under paragraph 2 of Schedule 2 to the Act, the defendant was subject to a proactive duty to anticipate the need for and to make reasonable adjustments to avoid the substantial disadvantage caused by the relevant PCP to disabled persons generally who might be prospective tenants. If the claim fell under Part 4, then under paragraph 3(5) of Schedule 4, the defendant, as a controller of premises to let, was subject to a more limited duty, namely, to make reasonable adjustments to avoid the disadvantage only where requested to do so by a disabled prospective tenant.

92. Mr Lock noted in *Nur* at [143] that there was no direct authority on the question of whether a housing authority that operates a housing allocation policy as required by section 166A of the Housing Act 1996 is bound by the provisions of Part 3 or Part 4 of

the Equality Act 2010. He had been referred by counsel for the defendant to an unreported decision of HHJ Worster in the Birmingham County Court handed down on 7 December 2015 in the case of *Ralley v Birmingham City Council*, a copy of the transcript of which was included in the authorities bundle for the hearing before me. Mr Lock considered that the judge's reasoning in *Ralley* did not assist him because it was concerned with the defendant local authority's duty to secure accommodation under Part VII of the Housing Act 1996 rather than its duty to allocate social housing in accordance with its allocation scheme under Part VI.

93. In *Nur* at [146], Mr Lock relied on the case of *R (Ward) v Hillingdon London Borough Council* [2019] EWCA Civ 692, [2019] PTSR 1738 (CA) in support of his conclusion that Part 3 applied to the claim in *Nur*. In *Ward*, Lewison LJ noted at [9] that it:

> "… is common ground that in allocating accommodation under Part VI of the Housing Act 1996 Hillingdon is providing services to a section of the public. Accordingly, section 29(1) [under Part 3] of the Equality Act 2010 comes into play."

94. Mr Lock noted that this common ground was shared by the EHRC, which was an intervener in *Nur*, and that there was nothing in the Code of Practice (referred to in *Nur* as "the Guidance") that suggested otherwise. He went on to observe at [149] that it:

> "… has not been suggested that the Council was operating its housing allocation policy for any other purpose than to fulfil its statutory role as a housing authority, including complying with its statutory obligations under s.166A of the Housing Act 1996. … ."

95. I note that the principal challenge in *Ward* was to the terms of the defendant's housing allocation scheme under Part VI of the Housing Act 1996. The principal challenge in *Nur* was to the operation of the defendant's housing allocation scheme. This case, however, concerns the obligations of the defendant as a landlord ("controller of let premises") in relation to a property, Flat 7, that has been allocated to FG in accordance with the defendant's housing allocation scheme, which is not challenged by this claim. Accordingly, neither *Ward* nor *Nur* assists, in my view, in resolving whether this claim falls under Part 3 or Part 4.

96. For a number of reasons, I consider that this claim clearly falls under Part 4 of the Equality Act 2010. As a preliminary point, I note that the allocation of social housing accommodation under Part VI of the Housing Act 1996 is more naturally described as the exercise of a public function than as the provision of a service to a section of the public. I will adopt the former description for the remainder of this analysis, but the outcome would be the same if the latter description were applied.

97. A local housing authority does not provide housing accommodation "for the purpose only of exercising a public function". It provides housing accommodation in order to comply with its statutory obligation to do so, having exercised the public function of allocating that housing accommodation to a person. Its provision of housing accommodation has more than one purpose, including, at a minimum:

i) complying with its statutory obligation to make the accommodation available to the person to whom it is allocated pursuant to its housing allocation scheme;

ii) managing its social housing stock in the public interest, including managing the composition, preservation, quantity, and quality of the stock; and

iii) in a case (such as this one), where it is also the landlord of the relevant property:

a) complying with its private law obligations under the tenancy agreement that it enters into with the person to whom the accommodation has been allocated; and

b) complying with its statutory obligations as a landlord in relation to its tenant.

98. The foregoing approach is a better fit with the scheme of the Equality Act 2010 than the approach that FG urges on the court. In this case, we are concerned with a local authority's obligations as a controller of let premises. Section 32(3) is too slender a basis for the proposition that all of a local authority's activities as social landlord are subject to Part 3 rather than Part 4 of the Act. There is no good policy reason for bringing all those activities under Part 3 and doing so would lead to some difficulties.

99. Among other things, Part 3 imposes the Second Requirement and a proactive duty to make anticipatory reasonable adjustments to avoid a disadvantage for disabled persons generally in relation to any "relevant matter". It makes sense that these aspects of Part 3 should apply to the exercise of a public function or the provision of a service, which are relatively narrowly focused and where "relevant matters" can more reasonably be anticipated. The management of let premises, however, involves a wide and varying range of activities, responsibilities, and special considerations. It is not feasible for a social landlord to be expected to anticipate and proactively make reasonable adjustments for the wide range of "relevant matters" that could arise in relation to the multiplicity of possible disabilities (such as, in this case, hypersensitivity to noise or smell).

100. This, presumably, is the reason why Parliament determined that in the Equality Act 2010 it should draw a distinction between, on the one hand, services and public functions, and on the other hand, premises, and deal with each of these areas in separate parts of the Act.

101. The foregoing conclusions are, in my view, reinforced by the fact that in the Code of Practice at paragraphs 3.24-3.25 the examples given of matters falling within the scope of section 32(3)(b) are narrow and specific, namely:

i) accommodation in prison for the purpose of the public function of remanding a suspect or detaining a convicted offender in custody; and

ii) the provision of overnight accommodation in a guesthouse.

102. I therefore reject Mr Nabi's submission that section 32(3) applies in this case to RBKC's obligations to FG as landlord in relation to Flat 7. RBKC's compliance with its obligations under the tenancy agreement does not form "part of" its exercise of its

public function. The entry into the tenancy agreement is one of a number of consequences of the exercise of the public function of allocating social housing in accordance with its allocation scheme.

103. If I am wrong, and this claim does fall within Part 3, however, then I agree with Mr Peacock that the Second Requirement does not, in any event, apply in this case to impose an *anticipatory* duty on RBKC.

104. Analogous to the conclusion of the Court of Appeal in *Finnigan*, which concerned the First Requirement, the Second Requirement imposes an anticipatory duty to make reasonable adjustments by reference to the needs of disabled persons as a class and not by reference to an individual in a specific case. Of course, since disabilities vary widely in nature, quality, and degree, the reference to "disabled persons generally" must be understood as meaning a set of disabled persons sharing a sufficient commonality of disability as a result of which they are at a substantial disadvantage relative to persons who are not disabled in relation to a relevant matter.

105. There is no reasonable adjustment that RBKC can make that would reduce or eliminate the substantial disadvantage suffered by FG as a result of any auditory or olfactory hallucination that she may suffer as a symptom of her paranoid schizophrenia. To be fair, FG is not suggesting that. On the other hand, there is no expert evidence in this case that either the Noise Issue or the Smell Issue arises to the level of a statutory nuisance. Accordingly, as to RBKC's anticipatory duty to make reasonable adjustments, the issue is limited to what it is reasonable for RBKC to have anticipated, for purposes of complying with the Second Requirement, by way of reasonable adjustments to address hypersensitivity to actual noise or actual smell arising from a psychosis. It can only be reasonable for RBKC to have anticipated this issue and taken appropriate steps in advance to avoid it if there is a sufficient class of such persons such that it would be apparent to a reasonable landlord that such steps should be taken.

106. The height of the evidence provided by FG as to the prevalence of hypersensitivity to noise and/or smell arising from psychosis as a relevant matter affecting a set of disabled persons as a class is at paragraph 6.6 of the Addendum dated 14 December 2023 to Dr Singh's report, where he says:

> "In addition to the perceptual abnormalities that are experienced in psychosis such as schizophrenia, people suffering from psychosis could experience heightened sensitivity such as to incoming sensory information including sounds and smells."

107. In my view, this is not a sufficient evidential base to support the conclusion that an anticipatory duty arises in this case in relation to the Noise Issue or the Smell Issue. No anticipatory duty arises on these facts. It cannot be reasonable or feasible for RBKC to have anticipated the Noise Issue or the Smell Issue based on the evidence presented in this case.

108. Assuming that Part 3 applies, did a specific duty to make reasonable adjustments arise once RBKC was put on notice of the Noise Issue and/or the Smell Issue? As far as the Noise Issue is concerned, FG raised this with RBKC in relation to the Russell Gardens flat. In other words, FG's hypersensitivity to noise was known by RBKC from that time. In relation to the Smell Issue, FG has raised this since she moved into Flat 7. In my

view, if Part 3 applies, a duty to make reasonable adjustments would arise at that point in relation to each of these issues. This is because, once the relevant matter has been identified to RBKC, RBKC is on notice that these physical features (noise and smell at Flat 7) have put FG, a disabled person who is part of a set (however big or small) of "disabled persons generally" who are hypersensitive to noise and/or smell by reason of psychosis, at a substantial disadvantage in comparison with persons who are not disabled. Dr Singh's evidence is sufficient to support this proposition, even if it is not sufficient to support the proposition that an anticipatory duty arises in this case. In other words, in my view, the fact that no anticipatory duty arises by reason of the Second Requirement does not mean that no specific duty arises to a person with a disability where the person exercising the public function or providing the service is put on notice of the disability. The purpose of paragraph 2(2) of Schedule 2 is to expand the scope of the duty rather than to limit it to an anticipatory duty only.

109. Mr Peacock submitted that another reason why the Second Requirement does not apply in this case is that the noise and smell complained of by FG are excluded as relevant physical features by the effect of paragraph 2(6) of Schedule 2, which reads:

> "In relation to the second requirement, a physical feature includes a physical feature brought by or on behalf of A, in the course of providing the service or exercising the function, on to premises other than those that A occupies (as well as including a physical feature in or on premises that A occupies)."

110. As I understood this submission during oral argument, Mr Peacock appeared to be arguing that the bracketed language at the end of this paragraph makes clear that the word "includes" in this paragraph should be read in a restrictive rather than expansive sense. I can see no good reason to read this provision in this way. I consider that "includes" should be given its natural sense of adding to the set of possible physical features and therefore that paragraph 2(6) does not exclude a physical feature, such as noise or smell, that comes on or into Flat 7 through some means other than by having been brought there by or on behalf of A.

111. The next question therefore arising, assuming Part 3 applies to this claim, is whether RBKC has complied with its duty to make reasonable adjustments in relation to the Noise Issue and the Smell Issue. This question needs to be determined objectively on the basis of the evidence. I have already referred to the burden of proof set out in section 136 of the Equality Act 2010. I consider that FG has discharged the evidential burden on her in relation to the Noise Issue and the Smell Issue. The burden is therefore on RBKC to establish that it has not contravened its duty to make reasonable adjustments in relation to each of the Noise Issue and the Smell Issue.

112. In relation to the Noise Issue, in my judgment, having reviewed the evidence, if Part 3 applies to this claim, then RBKC has not contravened its duty to make reasonable adjustments for the following reasons. The expert evidence establishes that the level of noise experienced in Flat 7 is, objectively speaking, normal. That, however, does not mean that it is not at a level that puts FG at a substantial disadvantage compared with persons without her disability. So, the question remains whether RBKC has contravened its duty to make reasonable adjustments in relation to the noise.

113. Having regard to the guidance on what adjustments are "reasonable" at paragraphs 7.29-7.80 of the Code of Practice, I am satisfied that RBKC has not contravened its duty to make reasonable adjustments. It has considered the KP Acoustics Report. It has determined that the "Upgrade Strategy" set out in section 5 of the KP Acoustics Report is too costly and disruptive to implement, particularly as it would require structural work within and reduce the living space of Flat 5. It is entitled, in my view, to conclude for those reasons that it would not be reasonable to make the proposed adjustments. Similarly, it is entitled, for similar reasons, to conclude that the alternative proposals for works entirely within Flat 7 that are set out in the supplemental response dated 20 December 2023 prepared by KP Acoustics Ltd would not be reasonable adjustments.

114. RBKC has not failed to make reasonable adjustments by refusing to instruct another acoustic engineer. FG has put forward no persuasive reasons why that would be a reasonable course for RBKC to take given that RBKC already has the KP Acoustics Report from FG's own acoustics expert, the adequacy of which has not been challenged by FG.

115. Finally, I consider that RBKC is entitled to conclude that it is not required to "decant" FG to avoid the substantial disadvantage caused to FG by the Noise Issue. First, there is the technical objection that RBKC is required by section 166A(14) of the Housing Act 1996 to allocate housing accommodation only in accordance with its housing allocation scheme. Secondly, there is no evidence that RBKC has in its housing stock an alternative property available where the Noise Issue would not arise, given that the Noise Issue arises at what is, objectively speaking, a normal level. Accordingly, RBKC would need to spend resources investigating whether it had within its stock an alternative property that was sufficiently soundproof to a level where the Noise Issue would not arise. RBKC is entitled to conclude that such an investigation, given its cost in terms of resources, with no guarantee of success, would not be a reasonable adjustment for it to be required to make. If FG wishes to be transferred to a new property under RBKC's housing allocation scheme, she can apply for such a transfer in accordance with the terms of the scheme.

116. In relation to the Smell Issue, there is credible evidence that there are, at least at times, foul smells in Flat 7. In addition to FG's own evidence, the weight of which is somewhat lessened by the fact that she also suffers from olfactory hallucinations, there is evidence from September 2022 in the form of correspondence from four friends and one acquaintance of FG, and from the fiancée of FG's youngest son, in which each states, in effect, that they have visited the flat and experienced a foul smell there. Mr Borrero, FG's solicitor, gave evidence as to a foul smell in Flat 7 in his witness statement dated 7 July 2023 (relating to a visit to Flat 7 on 27 June 2023) and in his witness statement dated 21 November 2023 (relating to a visit to Flat 7 on 14 November 2023).

117. On the other hand, there is undisputed evidence to the following effect:

    i) The joint expert, Mr McCormack did not identify any foul smell (whether amounting to a statutory nuisance or otherwise) when he inspected Flat 7 in August 2022.

ii) Mr Cockram, from PG Ashton & Sons, did not note any troublesome smell during his visit to Flat 7 on 22 February 2023. He did note an "unusual" smell in the kitchen near the dishwasher when it was pulled out, but that smell dissipated within twenty minutes. He made recommendations to clean all small-bore pipework and to descale the stack pipe. This work was subsequently carried out by FCDS.

iii) An engineer from FCDS, instructed by RBKC, noted "slight smells" when he attended Flat 7 on 17 February 2023. On 1 March 2023, an engineer from FCDS cleared and cleaned all small-bore pipework. On 30 March 2023, engineers from FCDS carried out a descaling of the stack pipe running through the building. They also inspected the stack pipe and found no cracks or breaks in it.

iv) On 13 June 2023, Mr Collins, RBKC's senior surveyor, attended Flat 7 with contractors, conducting an investigation of the stack pipe running through Flats 1, 5 and 7. He noticed a smell only in Flat 1 where a dead rat was found once the boxing around the stack pipe was removed. Following this, the boxing was replaced and resealed. Mr Collins found no issues with the stack pipe during his investigation. The boxing around the stack pipe in each of Flats 1, 5, and 7 was replaced. A slight gap in the boxing in Flat 7 was noticed by Mr Cockram and was sealed.

118. I note that the evidence of foul smells at Flat 7 set out in correspondence in September 2022 from associates of FG pre-dates the works at Flat 7 carried out by FCDS and by Mr Collins. The evidence of Mr Borrero post-dates that work. There is a conflict in the evidence on the question of foul smell in Flat 7 that I cannot resolve definitively on the documentary evidence. I note, however, that RBKC has clearly allocated significant resources to investigating and attempting to address the Smell Issue and has provided evidence that, contrary to the allegations in Ground 2, it has complied with the recommendations in the PG Ashton & Sons report, including the various works relating to the small-bore pipework, the stack pipe, and the related boxing that I have already summarised. Under the circumstances, it is hard to envisage what more it can reasonably be expected to do. Accordingly, I am satisfied that RBKC has not discriminated against FG in contravention of the Equality Act 2010 by failing to make reasonable adjustments in relation to the Smell Issue.

119. For reasons comparable to those I have given in relation to the Noise Issue, I do not consider that decanting FG to another property is a reasonable adjustment that RBKC could, but has failed to, make in relation to the Smell Issue.

120. In relation to the PSED, having regard to the evidence I have reviewed regarding the efforts of RBKC to address the Noise Issue and the Smell Issue, I accept the submission made by Mr Peacock that FG's claim that RBKC has failed to comply with the PSED is not made out. There is nothing in Ground 3 that survives the failure of Grounds 1 and 2.

121. In relation to delay, this claim has been brought neither promptly nor within 3 months after the grounds to make the claim first arose. By, at the latest, 9 December 2022, FG was arguing that the Noise Issue and the Smell Issue had arisen. This claim was issued over five months later on 24 May 2023. However, as I have granted permission in relation to Grounds 1, 2 and 3, and I do not consider that RBKC has suffered the

requisite hardship, prejudice, or detriment by reason of undue delay such that FG should be refused a remedy on this basis, I do not dismiss the claim on the basis of FG's undue delay in bringing it.

Summary of answers to the agreed list of issues

122. It follows from the above analysis that my answers to the agreed list of issues are as follows (following the numbering of the issues at [71] above):

i) This claim falls under Part 4 (Premises) of the Equality Act 2010.

ii) If this claim falls under Part 3, a physical feature of Flat 7 can give rise to the Second Requirement being imposed on RBKC even though RBKC is not in occupation of Flat 7. The same question in relation to Flat 5 does not arise on the facts of this case because the relevant physical features are noise and smell as perceived by FG in Flat 7.

iii) If this claim falls under Part 3, no anticipatory duty of RBKC to make reasonable adjustments in relation to noise or smell arose on the facts of this case, but a specific duty to make reasonable adjustments arose when RBKC was notified of the Noise Issue and the Smell Issue.

iv) RBKC has taken reasonable steps to avoid substantial disadvantage to FG as a result of the noise and the smell to which she is hypersensitive by virtue of her psychosis, namely, those steps that I have summarised above.

v) In relation to the Noise Issue, RBKC has not discriminated against FG by failing to adopt the upgrade strategy in the KP Acoustics Report, or failing to take other steps such as instructing an acoustics engineer to inspect and report on works and then carrying on those works, or failing to decant FG to another property.

vi) In relation to the Smell Issue, RBKC has not discriminated against FG by failing to carry out a further inspection and failing to seal the drainage stack and waste pipework, because on the evidence before the court RBKC has, in fact, arranged for the small-bore pipework and the drainage stack pipe to be inspected and cleaned and for the boxing around the stack pipe in Flat 7 to be sealed. RBKC has not discriminated against FG by failing to decant her to another property.

vii) RBKC has not breached its obligations to FG under the PSED.

viii) The claim was not filed promptly, however the court has exercised its discretion to extend time for the purposes of granting permission and does not consider that, if a remedy were otherwise to be granted, that it should be denied in this case on the basis of FG's undue delay in filing the claim.

Conclusions

123. Each of Ground 1 and Ground 2 fails on the basis that the Second Requirement does not apply because the claim falls under Part 4, for the reasons I have given. If that is wrong, then each of Ground 1 and Ground 2 fails in any event because FG has not established that RBKC has discriminated against her by failing to make reasonable

adjustments to address the Noise Issue (Ground 1) or the Smell Issue (Ground 2), for the reasons I have given.

124. Ground 3 fails because nothing in it survives the failure of Grounds 1 and 2.

125. Accordingly, FG's claim for judicial review is dismissed.